87-305

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1987

—o—

JEAN ANN CONE,

Plaintiff-Petitioner,

v.

THE FLORIDA BAR;
FLORIDA BAR FOUNDATION; and
HOLLAND & KNIGHT,

Defendants-Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in holding that the petitioner had no property right in money earned as interest on her principal which was held in trust in an interest-bearing bank account?

2. Did the State take property belonging to the petitioner when it permitted her money to earn interest in a bank account and then took the interest which was earned on that money to be used for "public purposes"?

3. May the State permit a person's money to earn interest only on the condition that the interest be paid to the State?

4. Did the petitioner have only a "unilateral expectation" that money belonging to her and held for her in trust by an attorney would earn interest when:

(a) the State Supreme Court has permitted the money to earn interest while on deposit and intended for it to do so;

(b) the attorneys holding it placed it in an interest-bearing account; and

(c) it *did* earn interest, net of service charges?

5. Is there a rational basis for a State's determination that only persons who have money held in trust by attorneys which is small in amount or to be held for a short period of time shall be required to make an additional contribution to the State's revenues in order to fund law school scholarships, improve the administration of justice, fund legal services for the poor, and other "exclusively public purposes"?

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OPINIONS BELOW

The district court's opinion is reported at 626 F. Supp. 132; a copy of it is included in the Appendix to this petition. The Court of Appeals' opinion is reported at 819 F.2d 1002, and is also reproduced in the Appendix.

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on June 19, 1987. This Court has jurisdiction over this petition by virtue of 28 U.S.C. § 1254.

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REGULATION INVOLVED

Relevant portions of Florida Bar Integration Rule 11.02(4) are reproduced in the Appendix.

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STATEMENT OF THE CASE

Facts of the Case

Historically, attorneys in Florida (as elsewhere) have been required to hold client trust funds in a manner which permits withdrawal and payment to the client "on demand". Most attorneys and law firms have chosen to maintain their clients' trust funds in accounts with banks.[1]

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[1] As used in this petition, the term "trust account" refers to an account maintained by an attorney in which funds, which are either intended to be held for a short period of time or which are nominal in amount, belonging to more than one client are pooled on deposit. Not at issue in this litigation are those segregated accounts which are opened, pursuant to an agreement between an attorney and a client, in which a substantial or long-term deposit of client money is held.

From at least as early as 1884, it was an "almost universal" practice among banks to pay interest on demand deposits. *See* Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client?*, 36 U.Fla.L.R. 674, 687 (1984). In 1933, however, payment of interest on demand deposits was prohibited by the government, Banking Act of 1933, ch. 89, § 11(b), Pub.L. 66, 48 Stat. 181 (1933). This governmental action, when combined with the requirement of immediate access to trust funds imposed on attorneys by the government, effectively foreclosed the earning of interest on trust accounts maintained by attorneys.

This situation prevailed until the 1970's, when the banking laws were modified to permit Negotiable Orders of Withdrawal ("NOW" accounts). These are, essentially, demand deposit checking accounts on which interest was permitted to be paid to individuals and charitable institutions, among others.

In 1969, Mrs. Evelyn Glaeser was a widow living in Tampa, Florida. She retained the law firm of Holland & Knight to handle various matters in connection with her late husband's estate. In connection with that retention she placed with the firm $100 to be held in trust as a deposit against costs.

At the conclusion of the probate proceedings and after expenses of $86.25 had been paid, there remained on deposit in the firm's then-non-interest-bearing trust account a balance belonging to Mrs. Glaeser of $13.75.

After the creation of NOW accounts, the Florida Supreme Court modified its Rule governing attorneys' trust accounts and, eventually, amended Florida Bar Integra-

tion Rule 11.02(4) to the form involved in this litigation, effective September 1, 1981, *In the Matter of Interest on Trust Accounts*, 402 So.2d 389 (Fla., 1981).

That amendment established the current IOTA program and permitted attorneys to maintain their pooled trust accounts, which held funds of clients which were nominal in amount or which were to be held for a short period, in interest-bearing accounts. It required, however, that the interest earned on those funds be paid to the Florida Bar Foundation and used for "public purposes" approved by the Supreme Court of Florida. The clients had no say in the decision as to whether their money would be maintained in such an account.

Holland & Knight chose to maintain its trust accounts in accordance with the provisions of the amended rule. On December 1, 1981, Holland & Knight's trust account (in which the $13.75 belonging to Mrs. Glaeser's was on deposit) was converted to an interest-bearing account, so that the monies in that account earned interest at the rate of 5¼% per annum.

The principal amount of $13.75 was returned to Mrs. Glaeser in September, 1984. In accordance with the Rule, however, the interest which had accrued on that principal was paid not to Mrs. Glaeser but, rather, to The Florida Bar Foundation. It has been stipulated that Mrs. Glaeser's $13.75 earned about $2.25 while it was held in Holland & Knight's trust account.

The Foundation then used that $2.25 (along with the millions of other dollars similarly paid to the Foundation) to build a reserve, to fund legal aid, to give loans and scholarships to law students and for other "exclusively public purposes".

This is precisely the process and result contemplated by the Supreme Court of the State of Florida when it authorized the IOTA program in 1981, *In the Matter of Interest on Trust Accounts,* 402 So.2d 389 (Fla., 1981).

Proceedings Below

This case, brought by Mrs. Glaeser in October, 1984, under the provisions of 28 U.S.C. § 1343 and 42 U.S.C. § 1983, asked that the Interest on Trust Accounts ("IOTA") program be declared unconstitutional.[2] She sought the return to her of the interest earned on her $13.75 and sought to represent a class of persons who also had had interest earned on their monies which were held in trust by various attorneys in Florida.

After an interlocutory appeal (which was dismissed as moot), the district court stayed discovery and directed the parties to stipulate the material facts. Cross-motions for summary judgment on the issue of the constitutionality of the IOTA program were then made and the court rendered judgment for the defendants, upholding the program, and the case was dismissed. *Cone v. The Florida Bar,* 626 F.Supp. 132 (M.D. Fla., 1986). The Court of Appeals for the Eleventh Circuit affirmed, *Cone v. State Bar of Florida* [sic], 819 F.2d 1002 (1987).

This petition followed.

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2 Mrs. Glaeser died in the summer of 1985 and Jean Ann Cone, the personal representative of Mrs. Glaeser's estate and residuary beneficiary under her will, was substituted as plaintiff.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to review and reverse the decision of the Court of Appeals because:

(1) The holding of the Eleventh Circuit:

(a) is squarely at odds with the holding of this Court in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); and

(b) broadens the application of this Court's holding in *Board of Regents v. Roth*, 408 U.S. 564 (1972), to encompass a set of circumstances never intended by this Court, in a manner which is inconsistent with the Fifth Amendment, and in a way which divorces the concept of "use" of property from that of "ownership".

(2) This is a question of national importance, in that 44 states and the District of Columbia have now implemented similar programs, and nearly $80 million earned on clients' funds has been taken and is being used by those states for "public purposes". *See* Big Interest in Small Change, 73 ABA Journal 70 (July 1, 1987).

If the petitioner is corect and this is an unconstitutional "taking", the practice should be stopped as quickly as possible. If, on the other hand, the program is constitutional, all uncertainty surrounding it should be removed. Only this Court can resolve the question with finality.

Paul Hill, general counsel for the respondent The Florida Bar, was recently quoted as saying, "We've got an action in the *Glaeser* [now, the *Cone*] case that should make the constitutionality of the IOTA concept clearer. The missing piece is whether these programs will be reviewed one day by the Supreme Court." Big Interest in

Small Change, 73 ABA Journal 70 (July 1, 1987). No better opportunity than this may ever present itself to this Court to provide the "missing piece".

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ARGUMENT

Taking of Property

In *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), this Court struck down a Florida statute which declared that interest earned on interpleaded funds was the property of the county. The only material difference between the factual situation presented in *Webb's* and the one in this case is that in *Webb's* the money on deposit earned over $90,000 while in the Clerk's custody, whereas here the deposit earned only $2.25. Conceptually, the cases are identical but, remarkably, the analysis used by the lower courts in this case is practically indistinguishable from the reasoning used by the lower courts in *Webb's*, which was unequivocally rejected by this Court.

The Court of Appeals read *Webb's* far too narrowly, focusing on the point that, in *Webb's*, the State was "exacting two tolls"—the imposition of both a statutory fee and the keeping of the interest. The court ignored the fact that under IOTA the State is entitled to exact *no* toll, since it is not providing any service to the attorney's client.

The holding of *Webb's* has been trivialized by the lower courts' decisions in this case, and those courts have ignored *Webb's* fifth amendment teachings. Under the fifth amendment, governments may not simply seize pri-

vate property for public purposes; "just compensation" must be paid for it. The amendment was passed, in part, to guard against the strong temptation for government to try to "do good" with private property. As this Court has recently re-affirmed,

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut that the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922), quoted in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* — U.S. —, 55 U.S.L.W. 4781, 4786 (1987).

The Court of Appeals' decision is certain to be widely read (since nearly all states now have IOTA programs) and it is, therefore, likely to be widely cited and followed. The analysis of the "taking" question, however, is wholly at odds not only with this Court's analysis in *Webb's* but with the teachings of the two most recent "taking" cases, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, above,* and *Nollan v. California Coastal Commission,* — U.S. —, 55 U.S.L.W. 5145 (1987).

In sum, the lower courts decided that Mrs. Glaeser had no property interest in the $2.25 (even though that $2.25 was earned on money belonging to her) because she had no "legitimate expectation" of her money earning interest in the first place. This formulation of the rule of decision was based on this Court's analysis in *Board of Regents v. Roth,* 408 U.S. 564 (1972), but it stands the *Roth* holding on its head.

In *Roth*, suit was filed because the plaintiff felt he had a right to renewal of his contract of employment with the State as a college teacher. This Court needed to decide whether there was some right found in the constitution which entitled Mr. Roth to more than that which his contract with the State granted him. In other words, did he have a "legitimate claim of entitlement" to continued employment, or did his claim rest only upon his own unsupported subjective expectations and desires?

The analysis used by this Court in *Roth* is useful in such a situation because it permits the drawing of a line between a plaintiff's hopes and dreams (his "unilateral expectations" and "abstract needs or desires"), on the one hand, and a legitimate claim of entitlement to an inchoate, or intangible, unreceived benefit, on the other.

Such an analysis is not appropriate where, as in this case, the State permits private property to generate a benefit of which it then claims ownership. An individual must *always* be said to have a "reasonable expectation" that she will be entitled to the monetary benefits generated by her property. To hold otherwise, as the lower courts did in this case, would undermine the very foundation of the Fifth Amendment protections.

The use of the *Roth* test to determine, as between the State and an individual, the ownership of the benefits which have already been generated by an individual's property is both dangerous and unnecessary. It is dangerous because such an analysis can be used to vest in the State the right to use any property so long as it can be said that there is an economic benefit from its use which was not "reasonably expected" to be realized by its owner.

It is unnecessary because the Fifth Amendment has already dealt with the problem by prohibiting the State from using private property for public purposes without compensation. The use of *Roth* by the lower courts in this case represents a radical revision of both constitutional law and property law and a vast expansion of the government's power to take without compensation that to which it otherwise might not lay claim. Such use of the *Roth* test should not be allowed to stand.

The *Roth* analysis should be used only when it is necessary to determine whether there is any benefit which, as of right, *should* have been generated and then an objective, not a subjective, standard must be used. Here, there is no doubt that, objectively, the expectation of interest being earned was *not* unilateral because everyone involved with the IOTA program (the State Supreme Court, the Bar, the Foundation, and the lawyers who were participating) expected that interest, net of all charges, would be earned on that money. Neither was it an "abstract need or desire" because the money *did* earn interest. Mrs. Glaeser was simply claiming that the interest her money earned belonged to her, not to the State.

In an attempt to distinguish the holding in *Webb's*, the lower courts in this case used a subjective test of the clients' expectations, speculating that the pro-rata share of administrative costs of sub-accounting for the interest earned by each client's money in a pooled trust account would be greater than the interest earned.[3] On that basis,

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[3] It is somewhat difficult to believe that the over $200,000 earned by Holland & Knight's trust account would all have been consumed by administrative costs. There was no opportunity for the petitioner to develop evidence to the contrary, however, since discovery was stayed.

they held that Mrs. Glaeser could not reasonably have expected her money to earn interest, despite the stipulated fact that the money *did* earn $2.25 interest *net* of all charges.

As to the supposed administrative costs which might be incurred by the attorneys in the handling of the trust account, it is irrelevant to the constitutional argument. The "taking" clause of the fifth amendment applied only to a governmental action, not to what fees and charges may be agreed to among private parties.[4] Most importantly, however, it was not the lawyers or the banks who charged Mrs. Glaeser for services rendered, but it was the State which appropriated that money for itself.

Simply stated, when the State uses private property to produce a benefit or takes a benefit produced by private property, *Roth* does not apply and the owner of the property is, by virtue of the provisions of the Fifth Amendment —*as a matter of law*—both:

(a) the owner of that benefit, and

(b) entitled to be paid just compensation when the State takes the benefit for itself.

That is the protection that the Fifth Amendment provides, and the use of the *Roth* analysis in this case undermines that protection.

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[4] The petitioner understands, however, that costs incurred by attorneys in maintaining their trust accounts are generally accounted for as part of their office overhead and are reflected in the fees they charge their clients.

Roth has never before been and should not now be applied in circumstances such as these.[5] This Court should grant *certiorari* and reverse the Court of Appeals to curtail this unwarranted extension of *Roth*.

Police Power Regulation

Respondents argued below that, even if Mrs. Glaeser had a property right in the $2.25 her money earned, the IOTA program should be sustained because it is simply a police power regulation of the right to earn interest. It is important that this Court reject that formulaion also.

Here, as in *Webb's*, the State is seeking to have one group of persons make a forced contribution to public revenues to be used for "public purposes". In this case, the choice of the group which is to make the contribution is in no way rationally related to the end sought to be achieved.

Florida has determined that additional funding is required for legal services for the poor, law student scholarships and improvements in the administration of justice. Florida has also decided, however, that taxpayers as a whole need not provide this additional funding. It has also decided that it needn't be provided by attorneys, nor

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[5] The district court's citation of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), for the proposition that the *Roth* test is applicable in a "taking" context appears to reflect a misreading of that holding. *Roth* was cited in *Short* simply for the proposition that property rights are determined by reference to State law, not for *Roth*'s application in a "taking" context. Moreover, *Short* did not involve any use by the State for its own benefit but, rather, involved the question of which of two *private* claimants owned certain mineral rights.

persons who use the courts, nor consumers of legal services, nor by any other generally identifiable group, save one.

Florida has decided that only one group—those persons who happen to have on deposit with attorneys amounts which are nominal in amount or which are to be held for a short period—needs to be singled out to make an additional contribution to this funding.

Florida has advanced no rational explanation of why *this* group of persons should bear this additional burden and none is apparent. This arbitrary determination, that this particular group of persons should bear an additional burden for the "public good" is what makes IOTA unconstitutional, even under the respondents' view of the issues.

There is no rational relationship between the choice of the group selected and the end sought to be served because it leaves some of the largest consumers of legal services free of any obligation to participate (because they may never have on deposit sums which are nominal in amount or which are to be held for a short period of time) and the amount any individual may end up contributing bears no rational relationship to the amount of legal services he may consume (because large amounts of money may flow through an attorney's trust account as a result of transactions in which very little legal work is performed).

Since there is no rational basis for this classification of those who should bear the expense of these programs, it must be struck down.

As was stated in *Webb's*, 449 U.S. at 163:

> Here . . . [the State] has not merely "adjusted the benefits and burdens of economic life to promote the common good." [*Penn Central Transportation Co. v. New York City*, 438 U.S.] at 124, 98 S.Ct. at 2659. Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 . . . (1960).

CONCLUSION

For all of the foreging reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

Jean Ann CONE, as Personal Representative of the Estate of Evelyn M. Glaeser, deceased, and as representative of a class of all persons similiarly situated. Plaintiff-Appellant,

v.

The STATE BAR OF FLORIDA, the Florida Bar Foundation, Inc., and Holland & Knight, Defendants-Appellees.

No. 85-3993.

United States Court of Appeals,
Eleventh Circuit.

June 19, 1987.

Before HILL and JOHNSON, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

HILL, Circuit Judge:

This case challenges the constitutionality of the Florida Bar's Interest On Trust Accounts (IOTA) program, through which certain funds held in lawyers' trust accounts are placed in interest bearing accounts to produce income for legal aid programs and other public purposes. The parties filed cross-motions for summary judgment, supported by stipulated facts.

In February, 1969, Ms. Evelyn Glaeser retained the law firm of Holland & Knight to probate the estate of her deceased huband. Ms. Glaeser paid a cost deposit of $100 to Holland & Knight, which was placed in a non-interest-bearing trust account. When the firm's representation of Ms. Glaeser concluded in 1970, $13.75 of the orig-

inal cost deposit remained in the trust account. Holland & Knight inadvertently failed to refund this amount to Ms. Glaeser, and it remained in the firm's non-interest-bearing account until December 1, 1981.

During this period, the Supreme Court of Florida approved the IOTA program. The IOTA plan authorized, but did not require, lawyers and law firms to place nominal or short term funds into pooled interest-bearing accounts, the interest proceeds of which to be remitted by the financial institution directly to the Florida Bar Foundation. The Foundation would then allot the funds to legal aid organizations, law student scholarships, and other charitable purposes. Only deposits which could otherwise not earn interest net of expenses (because they were nominal in amount or were to be held for a short period of time) could be used to generate interest under the IOTA program.

On December 1, 1981, Holland & Knight transferred all of its nominal or short term trust account funds, including Ms. Glaeser's $13.75, to an interest bearing IOTA account, where Ms. Glaeser's deposit remained for almost three years. After discovering its error, Holland and Knight returned the principal amount to Ms. Glaeser by check on September 26, 1984. During the time that the money was in the interest-bearing account it generated $2.25 of interest, which was given, pursuant to the IOTA, to the Florida Bar Foundation.

Ms. Glaeser, claiming to represent all persons similarly situated, sued Holland & Knight, the Florida Bar, and the Florida Bar Foundation, to recoup this interest. She claimed that the appropriation of the interest earned

on her money constituted an uncompensated taking of private property in violation of the Fifth Amendment (as applied to the states via the Fourteenth Amendment), and deprivation of her property without due process, as well as a breach of fiduciary duty under state law. Her[1] argument was simple: any interest earned on her portion of the Holland & Knight IOTA account belonged to her.

The district court correctly perceived that the appellant's constitutional claims turned on one question, that being, whether the interest earned on nominal or short term funds held in an IOTA account was the property of the client for the purposes of the Fifth and Fourteenth Amendments. Appellant relied on the traditional property doctrine that interest follows principal. However, as the district court noted, "when Justice Johnson observed in *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319, 3 L.Ed. 111 (1809), that 'interest goes with the principle, as the fruit with the tree,' his illustration necessarily assumed the existence of a fruit-bearing tree." The district court found that in the absence of the IOTA program, Ms. Glaser's money would not have borne any fruit, for her benefit or for anyone else's. Due to the regulations governing interest-bearing accounts, and the economic realties of attempting to produce income with such nominal or short-term deposits, the court determined that appellant's individual deposit could not have earned any interest net of expenses without the IOTA. Thus, it could not be said that she had a legitimate claim of entitlement to the inter-

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1. Ms. Glaeser passed away during the pendency of this suit and was replaced by Jean Ann Cone, the personal representative of her estate.

est which she claimed was taken from her without due process or just compensation. The court therefore dismissed her case, and we now affirm.[2]

To demonstrate a constitutionally cognizable property interest appellant must show that she has a specific and legitimate "claim of entitlement" to the $2.25 generated on the $13.75 held for her in Holland & Knight's IOTA account. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). A legitimate claim of entitlement can be based on positive rules of substantive law or mutually explicit understandings. *Perry v. Sinderman,* 408 U.S. 593, 601-02, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972) These principles are designed to protect the claimant's reasonable, often investment-backed expectations, rather than inchoate unilateral expectations. *Penn Central Transportation Co. v. The City of New York,* 438 U.S. 104, 124-25, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). Thus, appellant must identify substantive law or mutually explicit understandings which give her a legitimate claim of entitlement to a share of the interest earned on Holland & Knight's IOTA account. The district court determined that appellant could not satisfy this requirement because of three factors: (1) ethical requirements placed upon the legal profession in dealing with any kind of trust account; (2) the economics of running an interest-producing demand account; and (3) the restrictions that federal banking law places upon interest-producing demand accounts. An examination of the history behind the IOTA account program supports this conclusion.

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2. After dismissing the federal claims the district court declined to exercise pendent jurisdiction over the state claims. This decision is not challenged on appeal.

Frequently, attorneys and law firms have the need to hold client funds, including advances for costs and expenses. The Florida Bar Code of Professional Responsibility, like the rules governing the conduct of attorneys in most states, requires that such funds be kept separate from the attorneys' own moneys. Moreover, attorneys and law firms must often use available-on-demand accounts to facilitate the prompt delivery of such trust funds to the client upon request. Integration rule of Florida Bar, Rule 11.02(4); Dr. 9-102(B)(4), Fla. Bar Code of Prof.Resp. Historically, this meant that attorneys had to use noninterest-bearing accounts for such client deposits because federal law forbade the payment of interest on available-on-demand accounts in most states. *See* Banking Act of 1933, Ch. 89, § 11(b), Pub.L. No. 66, 48 Stat. 181 (1933). For these reasons, client trust deposits were normally pooled and maintained in a single noninterest-bearing demand account, separate from the attorney's own funds. *See* ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 348, 68 ABA Journal 1502 (1982).[3]

Before the initiation of the IOTA, the only beneficiaries of the old regime were the banks, who were treated to "free" use of trust account deposits. The IOTA plan was designed to put these dormant funds to good use. Because of the various restrictions described above, the orig-

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3. Where funds are held for a specific client, and the expected holding period makes it obvious that the money could earn interest that would exceed the lawyer's administrative costs and the bank charges, the lawyer should consult the client about depositing the funds in such a way as to generate interest. *See* ABA Formal Op. 348, 688 ABA Journal 1503 (1982). An attorney is normally required to place trust funds in an interest bearing account if the client so requests. *Id.*

inal plan for Florida's IOTA program provided that client trust funds could be deposited into a pooled savings account. This would earn interest for the Florida Bar Foundation. Funds could be immediately transferred (at the client's request) to a noninterest-bearing checking account, to facilitate the quick return of such funds to the client. *In re Interest on Trust Accounts*, 356 So.2d 799, 804 (Fla. 1978). While still somewhat cumbersome, this scheme would have allowed some interest to be earned on the funds. However, this version of the program was never implemented; instead, the IOTA program was able to capitalize on the arrival of interest-bearing checking accounts, which vastly enhanced the program's feasibility.

Interest-bearing checking accounts were authorized by the Consumer Checking Account Equity Act, 12 U.S.C. § 1832(a)(1) (1982). The Act allows for interest to be paid on certain types of available-on-demand accounts, specifically, Negotiable Order of Withdrawal accounts, commonly known as "NOW" accounts. However, the statute restricts the use of NOW accounts; only funds owned by individuals, certain charitable non-profit organizations, or public entities are allowed to receive interest on their checking accounts.[4] *See* 12 U.S.C. § 1832(a)(2) (1982); 12 C.F.R. §§ 217.157, 329.103, 526.1(1) (1986) (discussing eligible depositors for NOW accounts).

The IOTA program, as implemented, circumvents these restrictions. Making an eligible nonprofit charitable organization (the Foundation) the sole recipient of the

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4. The Florida IOTA program was able to utilize NOW accounts as early as 1981 via a special ruling from the Federal Reserve Board. 68 A.B.A.J. 1504 at n. 7.

interest produced by the trust funds enables the IOTA to use NOW accounts without violating 12 C.F.R. § 217.157. Making one entity the recipient of the fund also enables interest to aggregate such that it exceeds bank charges, because the bank does not need to sub-account the fund. The money produced by the IOTA may thus be used to provide legal services for the poor, and other charitable pursuits. At last count, 41 states and the District of Columbia had adopted IOTA programs.[5]

In this case, the district court found that appellant's nominal deposit could not have been placed in a separate NOW account because $13.75 fell short of the minimum balance requirements for such an account. Even assuming that the money could be deposited in an interest bearing account, the administrative costs incurred by Holland & Knight, along with the bank service charges, would have devoured the estimated $.06 per month in gross interest produced by appellant's $13.75 deposit. The district court

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5. *See* National IOLTA Clearinghouse, 3 IOLTA Update (Spring 1986). The Supreme Courts of at least 30 of these states have agreed with the Florida Supreme Court that no property is taken via the establishment of an IOTA program because such programs create income which would never, under any set of circumstances, accrue to the benefit of the client. *See e.g., Matter of Interest on Trust Accounts*, 402 So. 2d 389, 395 (Fla.1981); *Petition of Minnesota State Bar Association*, 332 N.W.2d 151 (Minn.1982); *Petition of New Hampshire Bar Association*, 122 N.H. 971, 453 A.2d 1258 (1982); *Matter of Interest on Lawyers Trust Accounts*, 672 P.2d 406 (Utah 1983); *In the Matter of Interest On Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984), *reversing*, 279 Ark. 84, 648 S.W.2d 480 (1983); *Petition of Massachusetts Bar Assoc.*, 395 Mass. 1, 478 N.E.2d 715 (1985); *Carroll v. State Bar of California*, 166 Cal.App.3d 1193, 213 Cal.Rptr. 305 (4 Dist.1984), *cert. denied sub nom. Chapman v. State Bar of California*, — U.S. —, 106 S.Ct. 142, 88 L.Ed.2d 118 (1985).

concluded that as an individual account maintained by Holland & Knight for the benefit of Ms. Glaeser, appellant could not have realized any interest net of expenses on her $13.75 deposit.

Moreover, the federal banking laws discussed above mean that appellant's nominal deposit could not be placed in a pooled NOW account maintained in Holland & Knight's name, because partnerships cannot maintain NOW accounts under federal banking regulations. 12 C.F.R. § 217.157. Nor could appellant's nominal deposit be placed in a pooled NOW account maintained by Holland & Knight as trustee for its clients, because the account would be partially composed of deposits of corporate clients in violation of federal banking laws. *Id.* Even assuming that Holland & Knight could maintain separate trust accounts for their corporate clients and their private, individual clients, the total cost of subaccounting would exceed the interest earned on the aggregate fund.[6] The district court concluded, and we agree, that:

> The end result of these economic and practical impediments to individual investment of IOTA funds is to negate any reasonable unilateral expectation, much less

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6. The affidavit of Holland & Knight's comptroller, John F. Dwiggins, attached to Holland & Knight's motion for summary judgment, indicated that the cost of subaccounting a pooled fund would have far exceeded the interest earned by appellant. This was supported by the affidavit of Herbert C.M. Hoover, Senior Vice President of the NCNB National Bank of Florida, who indicated that the charge for subaccounting was $2.00 per month for each subaccount in a pooled account, plus $.25 per transaction. This fee would be 30 times larger than the gross interest per month produced on appellant's nominal deposit of $13.75. Appellant did not offer any contradictory evidence on this point.

a mutually explicit understanding, that a client such as Mrs. Glaeser should receive interest generated by the IOTA program.

The sole authority cited by appellant in support of her contention that she has a substantive right to IOTA proceeds is *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). In *Webb's,* the Supreme Court struck down a Florida law which declared interest accrued on interpleader funds deposited with the registry of a county court to be the property of the court clerk. The Supreme Court found that the Florida statute allowed the county to, "exact two tolls," because under the statute the county was allowed to charge a processing fee, and, additionally, keep all the interest accruing from money deposited with the court. Florida Stat. § 676.106(4) (1977).

The Supreme Court did base its decision in *Webb's* upon the "usual and general rule [that] any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." 449 U.S. at 162, 101 S.Ct. at 451. The court noted that a recharacterization of this interest as public money was not a sufficient justification for the taking. While the court "express[ed] no view as to the constitutionality of a statute that prescrib[ed] a county's retention of interest earned, where the interest would be the only return to the county for the service it renders" in setting up the interpleader fund, it found that the double toll imposed by the Florida statute was an unconstitutional taking.

Despite the superficial similarity, the *Webb's* decision is distinguishable from this case in that the interest earned

on the interpleader funds deposited pursuant to the Florida statute did give rise to a legitimate claim of entitlement. The funds were sufficient in amount, and held for a sufficient period of time, to generate $90,000 in interest over a year and a half. *Id.*, 449 U.S. at 158, 101 S.Ct. at 449. The district court in this case correctly concluded that, "the crucial distinction is not the amount of interest earned, but that the circumstances led to a legitimate expectation of interest exclusive of administrative costs and expenses." The district court pointed out that the Supreme Court in *Webb's* found that the challenged statute had "the practical effect of appropriating for the county the value of the use of the fund for the period in which it [was] held in the registry." *Id.*, 449 U.S. at 164, 101 S.Ct. at 452. Here, the district court concluded as a matter of law that the use of Ms. Glaeser's money had no net value, therefore there could be no property interest for the state to appropriate. We agree.[7]

In affirming the district court, we emphasize that we are not establishing a de minimis standard for Fifth Amendment takings, or due process violations. We do not wish to imply that the state may constitutionally appropriate property so long as the property is very small property. Here, there was no taking of any property of the

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7. Where an attorney wrongfully withholds money from a client, by law that client may or may not be entitled to interest on the wrongfully withheld funds. In such a situation the interest is in the nature of a penalty. Our affirmance of the district court is not intended to cover interest awarded in such a situation.

plaintiff.[8] Standing alone, her deposit in the IOTA account could not earn anything. By combining all such deposits, interest income has been created which was not within the legitimate expectations of the owner of any one of the principal amounts.[9]

For the foregoing reasons the judgment of the district court is AFFIRMED.

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8. Appellant also argues that the existence of her property interest is proven by the fact that the IRS made clear it would treat IOTA income as income to the attorney's client if the client had a say in whether or how to invest the money. To avoid this result, the IOTA program was amended in 1981 to eliminate client control over the investment of the funds. We agree with the Florida Supreme Court that the IRS' opinion was based on traditional notions of assignment of income under revocable trust funds; its decision did not account for the unique circumstances of this case. *See In re Matter of Interest on Trust Accounts*, 402 So.2d 389 (Fla.1981). Moreover, the "assignment of income" doctrine is not designed to determine who is the legal owner of specific property; rather, the purpose of the doctrine is to assure that income is taxed to he who earns it. *See McLucas v. Earl*, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731 (1930).

9. Appellant also argues that, as in *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), the fact that the government makes use of private property in a way that the owner could not use it does not mean that there is no taking. This argument misses the point. In *Causby*, the court found a "taking" in the government's use of air space above the claimant's land because this destroyed his ability to use his land as a chicken farm. It was undisputed that the chicken farmer in *Causby* had a *property interest*. The question was whether or not a "taking" occurred. The farmer was economically damaged to the extent that he could no longer use his property as a chicken farm.

Jean Ann CONE, as Personal Representative of the Estate of Evelyn M. Glaeser, deceased, and as representative of a class of all persons similarly situated Plaintiff,

v.

THE FLORIDA BAR, The Florida Bar Foundation, Inc., and Holland & Knight, on behalf of itself and as a representative of a class of all persons similarly situated, Defendants.

No. 84-1345-Civ.T-13.

United States District Court,
M.D. Florida,
Tampa Division.

Dec. 18, 1985.

MEMORANDUM OPINION

LYNNE, District Judge, Sitting by Designation.

I.

This action comes before the Court on cross motions for partial summary judgment. In her claim against The Florida Bar, Florida Bar Foundation, Inc., and the Holland & Knight law firm, the plaintiff challenges the constitutionality of Florida's Interest on Trust Accounts (IOTA) program, through which certain funds held in lawyers' trust accounts are placed in interest-bearing accounts to produce income for legal aid programs and other public purposes.[1] The plaintiff alleges that this appropriation of interest earned on her money constitutes an uncom-

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1. For a more detailed description of the background and operation of the IOTA program, *see In re Interest on Trust Accounts*, 402 So.2d 389 (Fla.1981), and Note, *Interest on Lawyers' Trust Accounts—Legal Issues and the Kansas Program*, 33 Kan.L.Rev. 145, 145-52 (1984).

pensated taking of private property in violation of the fifth amendment.[2]

The plaintiff's constitutional claim stands or falls on one threshold question: Is interest earned on nominal or short-term funds held in an IOTA account the property of the client for purposes of the fifth amendment? If so, then that property interest may not be appropriated by Florida's IOTA program without just compensation. Having considered the motions and the submissions of counsel and *amici curiae*, the Court finds as a matter of law that, by pooling funds otherwise unproductive and inappropriate for investment, Florida's IOTA program interferes with no property interest protected under the taking clause of the fifth amendment.

II.

The facts underlying this dispute are stipulated for purposes of the motions for partial summary judgment.[3] In February, 1969, Evelyn M. Glaeser retained the Holland & Knight law firm to probate the estate of her deceased husband. Mrs. Glaeser paid a cost deposit of $100.00 to Holland & Knight, which was placed in a non-interest bearing trust account. When the firm's representation of

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2. The plaintiff also alleges that the IOTA program constitutes a denial of procedural due process, conversion of property, and breach of fiduciary duty. By order of this Court on March 5, 1985, the constitutional issues were submitted on stipulated facts. No other pending motions or issues are addressed in this opinion.

3. Therefore, this case may properly be resolved by way of summary judgment under Fed.R.Civ.P. 56(c). *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir.1985).

Mrs. Glaeser was concluded in 1970, $13.75 of the original cost deposit remained in the trust account. Through inadvertence, this amount was not refunded to Mrs. Glaeser but remained in the firm's non-interest bearing account until December 1, 1981.

During the period in which Mrs. Glaeser's money was held by Holland & Knight, the Supreme Court of Florida approved and implemented a plan to earn interest on the tremendous sums of money lying dormant in trust accounts across the state. Following the example of several other English-speaking jurisdictions, the supreme court promulgated a plan for lawyers and law firms to place nominal or short-term trust funds into interest-bearing accounts, the proceeds of which would be allotted to legal aid organizations, law student scholarships, and other appropriate measures to benefit the public. After a seven-year period of investigation, study, and modification, the supreme court adopted in final form the Interest on Trust Accounts (IOTA) program on July 16, 1981.[4] Financial institutions paid accumulated interest to the Florida Bar Foundation, Inc., a non-profit charitable corporation authorized by the supreme court in 1978 to receive funds generated by IOTA accounts and to oversee the allotment and distribution of these funds in accordance with IOTA's stated goals.

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4. The Florida IOTA plan was amended in 1979 to drop three objectives for fear that these proposed uses were not sufficiently charitable for IRS approval. *See In re Interest on Trust Accounts,* 372 So.2d 67, 69 (Fla.1979). The program was further amended to remove all client control over the determination whether to participate in IOTA in order to avoid possible assignment-of-income issues and resultant income tax liability. *See In re Interest on Trust Accounts,* 402 So.2d 389, 391 (Fla.1981).

On December 1, 1981, Holland & Knight transferred all of the firm's nominal or short-term trust account funds, including Mrs. Glaeser's $13.75, to an interest-bearing IOTA account, where it remained for almost three years. After discovering its error, Holland & Knight returned the principal amount to Mrs. Glaeser by check dated September 26, 1984.

III.

The plaintiff's constitutional challenge of Florida's IOTA program is based upon her contention that any interest earned on her money while entrusted to Holland & Knight must belong to her. The plaintiff contends that any appropriation of this interest by the state—no matter how small the amount or justifiable the reason—is an uncompensated taking in violation of the fifth amendment.

It is axiomatic that the fifth amendment prohibits government from taking citizens' private property without just compensation. *See* U.S. Const. amend V. It is equally well-settled that this proscription applies to the states through the fourteenth amendment. *E.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 450, 66 L.Ed.2d 358 (1980). The fifth amendment, however, safeguards only those private interests that fall within a specialized definition of "property" for purposes of constitutional protection. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, in-

stead, have a legitimate claim of entitlement to it."[5] *Board of Regents v. Roth*, 408 U.S. 564, 578, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Although the federal constitution guarantees the protection of private property from uncompensated governmental interference, it does not undertake to define a protectable and legitimate claim of entitlement. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Such claims are created and their dimensions are defined by existing independent sources such as positive rules of substantive law or mutually explicit understandings. *Id.*: *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972). When applied to the IOTA program, neither of these sources confers upon the plaintiff a legitimate claim of entitlement to any interest generated by her $13.75.

A. Substantive Law

As the foundation for her theory that she owns any interest earned on her portion of the Holland & Knight IOTA account, the plaintiff relies upon the traditional property doctrine that interest follows principal. The attempt to extend this principle to the present facts ignores the realities of the IOTA program and is not persuasive.

First, federal banking laws negate any contention that the plaintiff has a substantive legal right to expect interest

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5. Although *Roth* involved an alleged deprivation of property without procedural due process, its definition of a protectable property interest is equally applicable in the context of a taking clause claim. *See Texaco, Inc. v. Short*, 454 U.S. 516, 525, 102 S.Ct. 781, 790, 70 L.Ed.2d 738 (1982) (applying *Roth* test to claims under procedural due process and taking clauses).

on nominal funds on deposit with Holland & Knight. Lawyers and law firms must use available-on-demand accounts to facilitate the frequent transactions attendant to trust accounts for nominal or short-term client funds. Federal law historically has forbidden financial institutions from paying interest on such accounts and only recently has been amended to allow interest-bearing demand accounts, commonly known as Negotiable Order of Withdrawal (NOW) accounts. *Compare* Banking Act of 1933, ch. 89, 11(b), Pub.L. No. 66, 48 Stat. 181 (1933) (forbidding payment of interest on demand accounts), *with* Consumer Checking Account Equity Act, 12 U.S.C. § 1832(a)(1) (1982) (allowing interest for certain NOW account depositors). Presently, NOW accounts are restricted by statute to accounts consisting only of funds owned by individuals, charitable nonprofit organizations, or public entities. *See* 12 U.S.C. § 1832 (a)(2) (1982); 12 C.F.R. §§ 217.157, 329.103, 526.1(1) (1985) (discussing eligible depositors for NOW accounts). These ownership restrictions prevent a law firm from maintaining a pooled NOW account for private investment of client funds. *See id.* The capacity to earn interest on nominal or short-term funds held by lawyers and law firms is created and remains viable only through IOTA, which channels the interest to the Florida Bar Foundation, Inc., an appropriate NOW account beneficiary. *See Carroll v. State Bar of California,* 166 Cal.App.3d 1193, 213 Cal.Rptr. 305 (upholding constitutionality of California's mandatory IOTA program), *cert. denied sub nom Chapman v. State Bar of California,* — U.S. —, 106 S.Ct. 142, 88 L.Ed.2d 118 (1985).[6]

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6. The *Carroll* case is the only adversarial proceeding to address the constitutionality of a state IOTA program. Eight

(Continued on following page)

In her contention that she has a substantive right to IOTA proceeds, the plaintiff relies most strongly upon a somewhat similar fact situation in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980). In the *Webb's* case, the Supreme Court held that a Florida statute allowing a county to retain more than $90,000 interest earned on interpleader funds deposited with the court effected an uncompensated taking in violation of the fifth amendment. The facts in the *Webb's* case, however, are clearly distinguishable from the IOTA program and the plaintiff's claim. First, the Supreme Court invalidated the Florida statute in large part because the state had authority pursuant to another statute to assess a statutory service charge for interpleader deposits, so that the challenged statute in fact allowed the state to "exact two tolls" upon the interpleader funds. 449 U.S. at 159, 101 S.Ct. at 450. The Court expressly limited its finding of an unconstitutional taking of interest to the narrow circumstances where a separate statute authorized a clerk's

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other state supreme courts, in adopting IOTA programs, have determined that IOTA does not violate a constitutionally-protected property right. *See Matter of Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984); *In re Interest on Trust Accounts*, 402 So.2d 389, 395 (Fla.1981); *In re Petition of Iowa State Bar Ass'n*, No. 84-1641, slip op. at 2 (Iowa 1984), *cert. denied sub nom Ronwin v. Supreme Court of Iowa*, — U.S. —, 105 S.Ct. 2325, 85 L.Ed.2d 843 (1985); *In re Massachusetts Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985); *Petition of Minn. State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn.1982); *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406, 407-08 (Utah 1983); *In re Adoption of Amendments to CPR DR9-102, IOLTA*, 102 Wash.2d 1101 (1984).

fee, *id.* at 164, 101 S.Ct. at 452, which sharply diminishes *Webb's* relevancy to the instant case.

The *Webb's* decision is further distinguishable in that the interest earned on the interpleader funds gave rise to a legitimate claim of interest. The funds were sufficient in amount and were to be held for a sufficient period of time to generate actual income.[7] In contrast, no such claim of entitlement exists for the plaintiff's nominal funds, which could garner no net income. In a pivotal passage from the *Webb's* decision, the Court held that the challenged statute had "the practical effect of appropriating for the county the *value of the use of the fund* for the period for which it [was] held in the registry." *Id.* (emphasis supplied). This language lends further support for the finding that Mrs. Glaeser had no substantive property right: when the use of specific funds has *no net value*, there can be no property interest for the state to appropriate.[8]

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7. The interpleader fund consisted of $1,800,000 and was held in the registry of the court for approximately one year. *See Webb's,* 449 U.S. at 161-62, 101 S.Ct. at 450-51. The crucial distinction is not the amount of interest earned, but that the circumstances led to a legitimate expectation of interest exclusive of administration costs and expenses.

   It is also interesting to note that the interest earned on the *Webb's* fund accrued to the benefit of the eventual recipients of the fund rather than the depositor. The defendants raise the point that many trust account funds eventually are distributed to parties other than the client who, therefore, should likewise receive any interest accrued.

8. The *Webb's* case was also rejected as controlling in *Carroll,* which stated that "Webb's does not address issues pertinent to this case." 209 Cal.Rptr. at 748. The Florida Supreme Court also distinguished IOTA from the *Webb's* facts, stating that "no client is compelled to part with 'property', since the program creates income where there has been none before, and the income thus created would never benefit the client under any set of circumstances. 402 So.2d at 395.

The plaintiff's argument that interest always follows principal is therefore inapposite in the context of the IOTA program. When Justice Johnson observed in *Himely v. Rose,* 9 U.S. (5 Cranch) 313, 319, 3 L.Ed. 111 (1809), that "interest goes with the principal, as the fruit with the tree," his illustration necessarily assumed the existence of a fruit-bearing tree. Mrs. Glaeser had no legitimate expectancy that she would receive income from her $13.75. She may not use the fifth amendment to create a pecuniary windfall where none previously existed. *See, e.g., United States v. Willow River Power Co.,* 324 U.S. 499, 502, 65 S.Ct. 761, 89 L.Ed. 1101 (1945) (purpose of taking clause is to protect against certain economic losses).

B. Mutually Explicit Understandings

Federal banking regulations impose certain ownership restrictions that effectively negate any mutual understanding between lawyers and clients that nominal or shortterm funds will be pooled and invested to generate interest. See discussion, *supra* at page 135. Individual NOW accounts for such funds, although viable under relevant banking law, nevertheless could not produce net income for clients because of service charges and limitations imposed by the financial institution. Monthly service charges, minimum balance requirements, and per-check charges on all but the larger NOW accounts render these investment vehicles worthless for client funds appropriate for IOTA investment.[9] Nor would individual investment of nominal or

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9. The minimum deposit requirement alone would have thwarted Mrs. Glaeser's chance to earn interest. NCNB National Bank of Florida, where Holland & Knight maintains its IOTA account, has always required a minimum balance of at least $100.00.

short-term funds be practical in light of transaction costs associated with the administration of such an account. *See* A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, *Report to the Board of Governors.* 22-24 (July 1982) (describing transaction costs in administering NOW account); A.B.A. Formal Opinion 348, 68 A.B.A. J. 1502, 1503 (1982) (requiring lawyers to invest client funds only when clear economic justification for time and effort involved). The end result of these economic and practical impediments to individual investment of IOTA funds is to negate any reasonable unilateral expectation, much less a mutually explicit understanding, that a client such as Mrs. Glaeser should receive interest generated by the IOTA program.

Based on the foregoing analysis, the Court finds that the Florida IOTA program encroaches upon no constitutionally protected property interest.[10]

IV.

There is an additional independent reason for the Court's granting the defendants' motion for partial summary judgment. Even assuming there is a protectable "property" interest, Florida's IOTA program does not constitute an unlawful "taking." This case does not involve a physical invasion but, at most, the regulation of the

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10. Because the property interests protected by the procedural due process and taking clauses are identical, *see supra* note 5, this determination also disposes of the plaintiff's procedural due process claim.

use of property to serve a vital public interest.[11] As such, the "bundle" and "strand" analysis articulated in *Andrus v. Allard,* 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), is persuasive.

Under the *Allard* analysis, the bundle of property rights of clients with nominal or short-term trust deposits is substantially intact: the IOTA program does not interfere with the client's ability to withdraw the nominal or short-term deposit and do with it as he wishes. At most, IOTA affects merely one strand of property rights by putting otherwise dormant, non-productive nominal or short-term client trust deposits to work to improve the legal system.

V.

For the reasons set forth above, this Court finds that the IOTA program is facially constitutional and that it does not constitute an unconstitutional taking under the Fifth Amendment. Therefore, an order will be entered denying plaintiff's motion for partial summary judgment and granting that of defendants. Because the resolution of these constitutional issues is tantamount to a final judgment in favor of defendants, such order will dismiss the constitutional claims with prejudice and decline to exercise pendant jurisdiction of plaintiff's state law claims.

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11. The Florida Supreme Court has clearly determined that the IOTA program serves a vital public interest, *see In re Interest on Trust Accounts,* 402 So.2d at 396, and the plaintiff has readily acknowledged the public purposes served by Florida's IOTA program.

DONE this 16th day of December, 1985.*

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* This opinion is the product of exhaustive research and careful analysis by Luther M. Dorr, Jr., Law Clerk.

FLORIDA BAR INTEGRATION RULE 11.02(4)(D) (RELEVANT EXCERPTS)

(4) Trust funds and fees. Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. . . .

(d) *Interest-bearing Trust Accounts.* A member of The Florida Bar who elects to create or maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time shall comply with the following provisions:

. . . .

(iii) Lawyers or law firms electing to deposit client funds in a trust savings account shall direct the depository institution:

(A) to remit interest or dividends, as the case may be, on the average monthly balance in the account, at least quarterly, to the Florida Bar Foundation, Inc.;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

(C) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance for each month of the period for which the report is made.

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-305

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JEAN ANN CONE,

Petitioner,

vs.

THE FLORIDA BAR, FLORIDA BAR FOUNDATION, and HOLLAND & KNIGHT,

Respondents.

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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AMICI CURIAE

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2. State Bar of Arizona
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13. Hawaii State Bar Association
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20. Louisiana State Bar Association

21. Maryland State Bar Association

22. Maryland Legal Services Corporation

23. Massachusetts Bar Association

24. State Bar of Michigan

25. Michigan State Bar Foundation, Inc.

26. Minnesota State Bar Association

27. Minnesota Lawyer Trust Account Board

28. Mississippi State Bar

29. Mississippi Bar Foundation

30. The Missouri Bar

31. Missouri Lawyer Trust Account Foundation

32. State Bar of Montana

33. National Association of IOLTA Programs, Inc.

34. National Interest on Lawyers' Trust Account Clearinghouse

35. National Legal Aid & Defender Association

36. Nebraska Lawyers Trust Account Foundation

37. State Bar of Nevada

38. Nevada Law Foundation

39. New Hampshire Bar Association

40. New Hampshire Bar Foundation

41. State Bar of New Mexico

42. New Mexico Bar Foundation

43. New York State Bar Association

44. Interest on Lawyer Account Fund of the State of New York

45. The North Carolina State Bar

46. North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts

47. Office of the Ohio Public Defender

48. Oklahoma Bar Foundation

49. Oregon State Bar

50. Oregon Law Foundation

51. Rhode Island Bar Foundation

52. South Carolina Bar

53. State Bar of South Dakota

54. Tennessee Bar Association

55. Tennessee Bar Foundation

56. State Bar of Texas

57. Texas Equal Access to Justice Foundation

58. Utah State Bar

59. Vermont Bar Association

60. Legal Foundation of Washington

61. The West Virginia State Bar

62. Central Florida Legal Services, Inc.

63. Florida Institutional Legal Services, Inc.

64. Florida Legal Services, Inc.

65. Legal Aid Society of the Orange County Bar Association, Inc.

66. Legal Aid Society of Palm Beach County, Inc.

67. Lutheran Ministries of Florida

NO. 87-305

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JEAN ANN CONE,

Petitioner,

vs.

THE FLORIDA BAR, FLORIDA BAR FOUNDATION, and HOLLAND & KNIGHT,

Respondents.

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Florida's interest on lawyers' trust accounts program, like the 45 similar programs throughout the country (herein collectively referred to as "Interest on Lawyers' Trust Account Programs," or

"IOLTA" programs) operates on the premise that nominal sums of money, or short term deposits, held by attorneys on behalf of their clients, constitute an unused economic resource which may be mobilized to generate income to improve the delivery of legal services to the poor. In short, IOLTA establishes a unique method of financing civil legal aid by harnessing assets that, before adoption of the program, were neither used nor capable of use.[1]

The sixty-seven Amici Curiae are all organizations vitally interested in the continued growth and success of IOLTA

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1. IOLTA's history and method of operation is explained in England & Carlisle, History of Interest on Trust Accounts Program, 56 Fla. B.J. 101 (1982). For a detailed explanation, and in depth analysis of the constitutional issues implicated by IOLTA, see Siegel, Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client? 36 U. Fla. L. Rev. 674 (1984).

programs as a mechanism for bringing the concept of equal justice under the law a step closer to reality. The twenty-nine participating state bar associations have all been instrumental in creating IOLTA programs in their respective states. The twenty-eight participating IOLTA administering agencies all collect IOLTA generated funds and distribute them to providers of legal services to the poor, and for other worthy law-related public purposes.

Six amici appear as a representative sample of Florida IOLTA recipients. They all depend on IOLTA funds to provide legal services to the poor.

The American Judicature Society, the National Legal Aid & Defender Association and the National Association of IOLTA Programs, Inc., appear as amici because they represent a membership committed to

improving the justice system so that all may have an equal opportunity to vindicate their rights. The National IOLTA Clearinghouse provides technical assistance to states seeking to adopt and implement IOLTA programs.

Each participating Amici Curiae believes that IOLTA is critically important to ensuring that those in need of legal services do not go without. Their participation, and the participation of the Ford and Rockefeller Foundations in providing funds to assist in the preparation of this brief, all attest to the acceptance of the IOLTA concept by providers of legal services to the poor and a broadly representative sample of the legal profession throughout the country. Firmly believing that IOLTA programs are in the best tradition of the legal profession and not violative of the

fifth amendment, Amici Curiae fully support The Florida Bar's, Florida Bar Foundation's, and Holland & Knight's position that the Florida IOLTA program does not violate the Taking Clause of the fifth amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

ARGUMENT

IOLTA PROGRAMS, WHICH DO NOT INJURE CLIENTS EVEN TO THE EXTENT OF A PENNY, ARE FULLY CONSISTENT WITH SUPREME COURT TAKINGS JURISPRUDENCE.

A. IOLTA's Nationwide Acceptance.

Forty-five states and the District of Columbia have adopted IOLTA programs. The highest courts of seven states have published formal opinions adopting IOLTA programs; expressly holding that IOLTA does not violate the fifth amendment.

Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981); Petition of Minnesota State Bar Association, 332 N.W.2d 151 (Minn. 1982); Petition of New Hampshire Bar Association, 122 N.H. 971, 453 A.2d 1258 (1982); Matter of Interest on Lawyers' Trust Acc., 672 P.2d 406 (Utah 1983); In the Matter of the Adoption of Amendments to CPR DR 9-102 IOLTA, 102 Wash.2d 1101 (1984); In the Matter of Interest on Lawyers' Trust Accounts, 283 Ark. 252, 675 S.W.2d 355 (1984), rev'g, 279 Ark. 84, 648 S.W.2d 480 (1983); Petition by Massachusetts Bar Ass'n, 395 Mass. 1, 478 N.E.2d 715 (1985).

In addition, thirty-three state supreme courts and the District of Columbia Court of Appeals have adopted IOLTA programs without formal opinion. IOLTA programs have been established by legislation in California, Connecticut, Mary-

land, New York and Ohio. The American Bar Association has endorsed the ethical propriety of IOLTA programs. A.B.A. Formal Opinion 348, 68 ABA J. 1502 (1982).

No court, in an adversary proceeding, has ever rejected an IOLTA program.[2] Two state supreme courts, without formal opinion, have refused to approve

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2. Three other challenges to IOLTA programs have been rejected. The California mandatory IOLTA program was upheld in Carroll v. State Bar of California, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (4 Dist. 1984), cert. denied sub nom. Chapman v. State Bar of California, ____ U.S. ____ (1985). In Ronwin v. Supreme Court of Iowa, (No. 84-1641), pet. for cert. denied, 471 U.S. 1101 (1985), this Court rejected an attempt to seek certiorari from the IOWA Supreme Court's rulemaking adoption of an IOLTA program. Terry v. Withrow, No. C85-1767 (N.D. Ohio filed June 21, 1985), filed by an attorney, was dismissed for lack of standing.

IOLTA programs.[3] IOLTA programs are currently under consideration in the remaining four states.

Two basic reasons account for the overwhelming acceptance of IOLTA. First, the legal profession fully recognizes the critical need for additional resources to improve the justice system. Second, there is no merit to the IOLTA opponents' taking claim.

This Court's multifactor balancing test [Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)], which examines taking claims by looking to the character of the governmental action and the economic impact of that action on the claimant, and particularly, the extent to which the action has interfered with dis-

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3. The Supreme Courts of Arkansas, Maine, Michigan and North Carolina initially rejected and then approved IOLTA programs.

tinct investment-backed expectations, leads to the inevitable conclusion that IOLTA programs do not take the client's property. Indeed, where the claimant's property is not otherwise impacted, loss of future profits will not support a taking claim. Andrus v. Allard, 444 U.S. 51 (1979). Or as Justice Peckham put it, if a claimant is "not injured to the extent of a penny . . . his abstract rights are unimportant." Hooker v. Burr, 194 U.S. 415, 419 (1904).

Because established taking doctrine requires at least some loss, and because petitioner can point to no loss from the operation of Florida's IOLTA program, her claim is not well-founded and does not merit review by this Court.

B. The IOLTA Premise. In upholding Florida's IOLTA program, the Court of Appeals, like the 37 state supreme courts

which have approved similar programs, recognized that IOLTA combines lawyer trust account mandates, economic realities, and banking law restrictions, to produce net income where, previously, there was no net income.

IOLTA is simplicity itself. Attorneys routinely receive funds in trust for future transactions. If the funds are large in amount or expected to be held for a long time, the attorney customarily deposits the funds in an interest-bearing account for the benefit of the client. IOLTA does not change this time-honored practice.

Often, however, lawyers hold clients' money in amounts which are very small or expected to be held for a very short period of time, making it impracticable and uneconomical to invest the

money productively for the client.[4] As a result, no interest is earned on these pooled accounts. Only the lawyer's financial institution benefits. Under IOLTA, all the inherently unproductive client deposits are pooled in an interest-bearing NOW account. The clients lose nothing. The interest earned only because of IOLTA is used to support law-related public services.

A few brief examples of the essentially nonproductive funds one would expect to find in an attorney's trust ac-

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4. The wide range of costs that lawyers incur include (1) the time to determine whether investment is warranted, (2) the time to obtain tax identification information, (3) the time to open a separate, income producing account, (4) law firm bookkeeping on a periodic basis, (5) preparation on tax reporting forms, and (6) the time required to close a separate, income producing account. A.B.A. Task Force and Advisory Board on Interest on Lawyer Trust Accounts, Report to the Board of Governors, 22-24 (July 1982).

count will demonstrate why no client is injured, not even to the extent of a penny.

1. **Cost Deposits.** A client involved in litigation is often required to provide costs in advance. In entrusting funds to the lawyer for the payment of costs, the client has no expectation of having the funds returned (although excess advances will be returned) nor any expectation of earning interest. The fact pattern sub judice is typical. Mrs. Glaeser gave her attorneys a $100 cost deposit. At the time of receipt, the small size of the deposit, as well as the expectation that the funds would be promptly disbursed, did not justify an effort to invest the funds. After disbursement, the small amount left over, $13.75, also did not justify investment. Indeed, as a practical matter,

$13.75 is inherently incapable of being put to productive use for an individual. The approximately 6¢ per month in earnings, at NOW account rates, would not offset bank service charges, let alone the costs incurred by attorneys to administer a separate interest-bearing account.

2. **Real Estate Escrows.** An attorney, representing the seller of a small piece of property, receives $500 to be held in escrow. At closing, some thirty to sixty days later, the deposit is applied to the sales price. If closing does not take place, depending on the sales contract and other factors, either the buyer or seller may be entitled to the deposit. The interest on the deposit, $2.19 per month, would not justify the expense required to negotiate provisions relating to the payment of interest or to set up a separate NOW account.

3. **Personal Injury Settlements.** Settlements come from insurance companies in the form of checks or drafts. Banks customarily indicate a time period in which it is safe to assume that the insurance company has "accepted" the draft or the check has cleared, but in fact the credit to the lawyer's trust account may occur sooner. In addition, there are a number of circumstances under which monies from the check or draft may stay in the account for days after disbursements are made. For example, assume $50,000 is received by an attorney on a Monday. The lawyer's trust account check is mailed to the client that day. It is received and deposited by the client on Wednesday. It clears the lawyer's bank on Friday. Everything has proceeded expeditiously, more expeditiously than likely. Does the client have any expectation of receiving

interest on the settlement amount during the four day "float" period? Clearly not. Yet, if the attorney's trust account were an IOLTA NOW account, some $28.76 would have been earned.

4. **Real Estate Closings.** In many instances, real estate closings are done in law offices. The attorney may receive the funds by wire a day in advance, thereby producing a one day accrual of interest. Or, the closing may be unexpectedly delayed for a day or two to clear last minute problems. As with personal injury settlements, disbursement checks will not clear instantly. The short term float will produce interest that cannot be apportioned in any rational way. Before IOLTA, only banks benefited from the float. Now, the public shares in the benefit.

C. Lack of a Substantial Constitutional Question. The fundamental flaw in petitioner's argument is her refusal to recognize that the $13.75 trust deposit did not produce, and was inherently incapable of producing, any net income which would ever accrue to her benefit. Mrs. Glaeser's claim to the 6¢ per month interest income totally ignores the cost of producing that income. On a quarterly payment basis, for example, the income produced would not even pay the cost of the postage necessary to mail her the interest earned, let alone all the other costs.

Both the District Court and the Court of Appeals fully understood the absence of net income-producing ability on the part of a $13.75 deposit when they rejected petitioner's claim, premised on Himely v. Rose, 9 U.S. (5 Cranch) 313,

319 (1809) that "interest goes with the principle, as the fruit with the tree," by noting that the "illustration necessarily assumed the existence of a fruit-bearing tree." Cone v. State Bar of Florida, 819 F.2d 1002, 1004 (11th Cir. 1987).

If customary trust rules are applied to attorney trust accounts, a client has no claim to interest earned in situations where the interest earned does not exceed the administrative costs incurred. IOLTA operates on that very real state of facts. Absent at least some real loss, no caselaw from this or any other court, turns a regulatory scheme into a taking. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) is not to the contrary. It certainly does not preclude the IOLTA's proponent's calculus that recognizes the real cost of pro-

ducing net income. Before IOLTA only banks benefited from the use of inherently unproductive client trust funds. Now, the justice system and the public benefits. If IOLTA is a taking, only banks, not the public and certainly not clients, will again benefit.

No substantial constitutional questions have emerged in any state with an IOLTA program. The rationale utilized by the Court below, as well as the reasons offered in support of IOLTA programs by the seven states with reported opinions, are fully consistent with this Court's taking jurisprudence.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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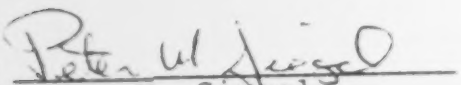
By 
Peter M. Siegel

NO. 87-305

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JEAN ANN CONE,

Petitioner,

vs.

THE FLORIDA BAR, FLORIDA BAR FOUNDATION, and HOLLAND & KNIGHT,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that, in accordance with Rule 28.3, I have served three copies of the annexed Brief in Opposition to the Granting of a Writ of Certiorari on the attorneys of record by placing a copy in the United States mail,

first class mail, postage prepaid, addressed as follows:

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All parties required to be served have been served. Done this 21 day of September, 1987.

Peter M. Siegel, Esq.

MOTION FILED
SEP 21 1987

No. 87-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In the Matter of:
JEAN ANN CONE,
Petitioner

v.

THE FLORIDA BAR, ET AL,
Respondents.

MOTION AND BRIEF OF OHIO STATE BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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No. 87-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

In the Matter of:

JEAN ANN CONE, Petitioner

v.

THE FLORIDA BAR, ET AL, Respondents

MOTION OF OHIO STATE BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The Ohio State Bar Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Petitioner has been obtained. The consent of all Respondents has not been obtained but one Counsel, Michael Nachwalter, has consented.

INTEREST OF AMICUS

The Ohio State Bar Association is a voluntary association whose membership is open to all members of the Bar of Ohio. The organization has 18,500 members and is directed

and managed by a 21 member Executive Committee elected by the membership. This Motion and Brief was authorized by the Executive Committee.

The Ohio State Bar Association is concerned with the question involved herein as to the constitutionality of INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA). The State of Ohio has a statutory, mandatory IOLTA program requiring all lawyers receiving client's funds, which are nominal or short term in nature, to deposit the same in interest bearing accounts. The interest earned thereon is paid to the state treasurer. The funds are then distributed through the office of the Ohio Public Defender and, at the present time, are used solely to support the delivery of civil legal services to indigents.[1]

The Ohio State Bar Association is the only statewide organization of attorneys in Ohio open to all lawyers regardless of areas of practice or special interest.

The decision of the court below in this case upholds the constitutionality of the Florida IOLTA program. It is the only Federal Court of Appeals decision on the subject. This Court has not spoken on the subject.

This *amicus* suggests to the Court that clients and lawyers throughout America are vitally interested in having a decision of this Court so that all uncertainty (as to constitutionality) surrounding IOLTA programs will be removed.

As stated in Petitioner's Brief "Only this Court can resolve the question with finality."

REASON FOR GRANTING THE WRIT

This Court should grant Certiorari to review the decision of the court below for the reason that the Eleventh Circuit Court of Appeals has decided an important federal consti-

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[1]Ohio Revised Code Sections 4705.09 and 4705.10.

tutional question which has not been, but should be, settled by this Court. The case involves a matter of great general public concern.

ARGUMENT

The court below held that the Florida IOLTA program is constitutional in that the use of the interest earned on trust funds held by lawyers is not a taking of property.

A recent publication of the ABA/IOLTA Clearinghouse, "I.O.L.T.A. UPDATE" (Vol. 4 No. 3 Spring 1987) states that over 100 million dollars has been raised in six years and that there are now 44 operable IOLTA programs. These numbers alone make it obvious that this case involves a matter of great general public concern. The interest of the Ohio State Bar Association is in having this Court speak clearly on the subject of the constitutionality of IOLTA programs.

Lawyers presently face a real dilemma. That is, for example, in Ohio the Legislature has enacted a statute, signed by the Governor, mandating that lawyers comply with the IOLTA program. Failure to follow the law in Ohio would be a subject for discipline, as it would be in most states.

If in the future the Supreme Court of Ohio, the Sixth Circuit Court of Appeals, or this Court, decide that the statute is unconstitutional the lawyers of Ohio will be faced with considerable difficulties, similar to that of Respondent Holland and Knight. The finality of a decision of this Court can lay this issue to rest.

For these reasons this *amicus* requests the Court to grant the Petition for a Writ of Certiorari requested by Petitioner.

This *amicus* further wishes to inform the Court that, if the Petition for Certiorari is granted, it intends to join the Respondents in urging that this Court affirm the decision of the court below.

CONCLUSION

For the reasons set forth herein the Ohio State Bar Association joins in requesting this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. The interests of lawyers and the public would be best served if this Court addresses the issues in this important constitutional case.

Respectfully submitted,

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No. 87-305

IN THE

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OCTOBER TERM, 1987

In the Matter of:

JEAN ANN CONE,
Petitioner

v.

Proof of Service of
AMICUS CURIAE BRIEF

THE FLORIDA BAR, et al.,
Respondents

I hereby certify that on this _____ day of September, 1987, three (3) copies of the Motion and Brief of Ohio State Bar Association as Amicus Curiae were mailed, postage prepaid, to Herbert P. Schlanger, Attorney for Jean Ann Cone, Suite 900, 230 Peachtree Street, N.W., Atlanta, Georgia 30303, Thomas C. MacDonald, Jr., Attorney for Defendant, The Florida Bar Foundation, P.O. Box 3324, Tampa, Florida 33601, Michael Nachwalter, Attorney for Defendant, The Florida Bar, 400 Edward Ball Bldg., 100 Chopin Plaza, Miami, Florida 33232, F. Wallace Pope, Jr., Attorney for Defendant, Holland & Knight, P.O. Box 1368, Clearwater, Florida 33157 and Peter M. Siegel, Attorney for National IOLTA Clearinghouse, Florida Justice Institute, Inc., 100 N. Biscayne Blvd., Suite 3030, Miami, Florida 33132.

I further certify that all parties required to be served have been served.

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APPENDIX

§ 4705.09 of certain client funds in interest-bearing trust account]

(A)(1) Any person admitted to the practice of law in this state by order of the supreme court in accordance with its prescribed and published rules, or any law firm or legal professional association may establish and maintain an interest-bearing trust account, for purposes of depositing client funds held by the attorney, firm, or association that are nominal in amount or are to be held by the attorney, firm, or association for a short period of time, with any bank or savings and loan association that is authorized to do business in this state and is insured by the federal deposit insurance corporation, or any deposit guaranty association organized under sections 1151.80 to 1151.86 of the Revised Code. Each account established under this division shall be in the name of the attorney, firm, or association that established and is maintaining it and shall be identified as a trust account. The name of the account may contain additional identifying features to distinguish it from other trust accounts established and maintained by the attorney, firm, or association.

(2) Each attorney who receives funds belonging to a client shall do one of the following:

(a) Establish and maintain one or more interest-bearing trust accounts in accordance with division (A)(1) of this section or maintain one or more interest-bearing trust accounts previously established in accordance with that division, and deposit all client funds held that are nominal in amount or are to be held by the attorney for a short period of time in the account or accounts;

(b) If the attorney is affiliated with a law firm or legal professional association, comply with division (A)(2)(a) of this section or deposit all client funds held that are nominal in amount or are to be held by the attorney for a short period of time in one or more interest-bearing trust

accounts established and maintained by the firm or association in accordance with division (A)(1) of this section.

(3) No funds belonging to any attorney, firm, or legal professional association shall be deposited in any interest-bearing trust account established under division (A)(1) or (2) of this section, except that funds sufficient to pay depository institution service charges in excess of earnings on the account shall be deposited in the account and other funds belonging to the attorney, firm, or association may be deposited as authorized by the Code of Professional Responsibility adopted by the supreme court. The determinations of whether funds held are nominal or more than nominal in amount and of whether funds are to be held for a short period or longer than a short period of time rests in the sound judgment of the particular attorney. No imputation of professional misconduct shall arise from the attorney's exercise of judgment in these matters.

(B) All interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be transmitted to the treasurer of state for deposit in the legal aid fund established under section 120.52 of the Revised Code. No part of the interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be paid to, or inure to the benefit of, the attorney, the attorney's law firm or legal professional association, the client or other person who owns or has a beneficial ownership of the funds deposited, or any other person other than in accordance with this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.

(C) No liability arising out of any act or omission by any attorney, law firm, or legal professional association with respect to any interest-bearing trust account established under division (A)(1) or (2) of this section shall be imputed to the depository institution.

(D) The supreme court may adopt and enforce rules of professional conduct that pertain to the use, by attorneys, law firms, or legal professional associations, of interest-bearing trust accounts established under division (A)(1) or (2) of this section, and that pertain to the enforcement of division (A)(2) of this section. Any rules adopted by the supreme court under this authority shall conform to the provisions of this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.

§ 4705.10 [Criteria for accounts; duties of depository.]

(A) An interest-bearing trust account established under authority of section 4705.09 of the Revised Code shall comply with all of the following:

(1) All funds in the account shall be subject to withdrawal upon request and without delay, or as soon as is permitted by federal law;

(2) The rate of interest payable on the account shall not be less than the rate paid by the depository institution to regular, nonattorney depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity qualifications, such as those offered in the form of certificates or deposit, may be obtained by a person or law firm establishing such an account if there is no impairment of the right to withdraw or transfer principal immediately.

(3) The depository institution shall be directed, by the person or law firm establishing such an account, to do all of the following:

(a) Remit interest or dividends, whichever is applicable, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, less reasonable service charges, to the treasurer of state at least quarterly for deposit in the legal aid fund established under section 120.52 of the Revised Code;

(b) Transmit to the treasurer of state, the state public defender, and the depositing attorney, law firm, or legal professional association, at the time of each remittance required by division (A)(3)(a) of this section, a statement showing the name of the attorney for whom or the law firm or legal professional association for which the remittance is sent, the rate of interest applied, the accounting period, the net amount remitted to the treasurer of state for each account, the total remitted, the average account balance for each month of the period for which the report is made, and the amount deducted for service charges.

(B) The statements and reports made under division (A)(3) of this section are confidential and shall be used only for purposes of administering the legal aid fund.

Supreme Court, U.S.
FILED
SEP 28 1987
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CLERK

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit correctly held that clients having nominal or short-term deposits in lawyers' IOTA accounts do not have a property right in the interest earned on those deposits, so as to come within the protection of the just compensation clause of the fifth amendment, when those deposits are inherently incapable of producing interest net of costs in the absence of the IOTA program.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-305

JEAN ANN CONE,

Petitioner,

v.

THE FLORIDA BAR, THE FLORIDA BAR FOUNDATION, INC., and HOLLAND & KNIGHT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

U.S. Const. amend. V (relevant portion):

> [P]rivate property [shall not] be taken for public use, without just compensation.

U.S. Const. amend. XIV (relevant portion):

> [No] State [shall] deprive any person of life, liberty, or property, without due process of law.

Florida Bar Integration Rule 11.02(4)(d) is inaccurately reproduced in Petitioner's Appendix. The Rule is correctly reproduced in the Appendix to this Brief. Petitioner's error is not material to the issues presented in this case.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate in several material respects. First, it is simply not true that clients of lawyers participating in the Florida Interest on Trust Accounts ("IOTA") program "had no say in the decision as to whether their money would be maintained in . . . an [IOTA] account." Petition at 3. Clients such as Mrs. Glaeser remained free at all times to ask that money held in trust by their lawyers be returned to them. Mrs. Glaeser never made such a request.

Petitioner also provides an incomplete and inaccurate description of the parties' stipulation "that Mrs. Glaeser's $13.75 earned about $2.25 while it was held in Holland & Knight's trust account." Petition at 3. The error is compounded at page 10 of the Petition, where Petitioner makes reference to "the stipulated fact that the money *did* earn $2.25 *net* of all charges." Petition at 10 (emphasis in original). In fact, the parties stipulated that "[a] deposit of $13.75 earning interest at the rate of 5¼% per annum *would earn* a total of approximately $2.25 in interest from December 1, 1981 through September 19, 1984." Joint Factual Stipulation 25 (emphasis added). Respondents have demonstrated through uncontroverted affidavits that a deposit of $13.75 *would earn* $2.25 in interest *only* if (1) minimum balance requirements were met *and* (2) no administrative expenses were incurred in maintaining the account, and that these two conditions can be satisfied *only* by pooling Mrs. Glaeser's funds with other short-term and nominal funds and forgoing any subaccounting. Affidavit of John F. Dwiggins, Comptroller for Holland & Knight (dated Apr. 29, 1985); Affidavit of Herbert C.M. Hoover, Senior Vice President of NCNB National Bank of Florida (dated Apr. 25, 1985); *see Cone v. State Bar of Florida*, 819 F.2d 1002, 1006 n.6 (11th Cir. 1987). To illustrate the principle, it is quite conceivable that the

simple arithmetic exercise undertaken by the lawyers involved in this case to arrive at the figure of $2.25 consumed more than $2.25 in attorney time, calculator depreciation and electricity. Exactly the same principle applies to the subaccounting of IOTA accounts by lawyers or bank officials who are not involved in litigation. It is precisely the *calculation* of the $2.25 which would consume it.

Finally, Petitioner's unduly truncated version of the proceedings below fails to convey the flavor of this lawsuit. Mrs. Evelyn M. Glaeser[1] filed this action against Respondents in October of 1984, on behalf of herself and as putative representative of a class of persons similarly situated, seeking relief for alleged violations of the just compensation clause, denial of procedural due process, conversion and breach of fiduciary duty. Petitioner sought compensatory damages in an amount equal to the interest earned on all IOTA accounts since 1981, punitive damages of approximately $15 million, and an injunction prohibiting the Florida Bar Foundation, Inc. ("the Foundation") from disbursing any IOTA funds on hand or received during the pendency of the action. After Petitioner's motion for a preliminary injunction was denied, Respondents moved to dismiss the Amended Complaint on numerous grounds. While these motions were pending, Petitioner filed a suggestion with the District Court that any member of The Florida Bar should recuse himself from the case. Thereafter, the original trial judge, the Honorable George C. Carr, United States District Judge for the Middle District of Florida, recused himself, and was replaced by the Honorable Seybourn H. Lynne, Senior United States District Judge for the Northern District of Alabama, sitting by designation.

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[1] Mrs. Glaeser died in the summer of 1985 and Jean Ann Cone, personal representative of Mrs. Glaeser's estate, was substituted as party plaintiff. As used in the balance of this brief, "Petitioner" refers either to Mrs. Glaeser or to Ms. Cone, as the context requires.

With Petitioner's concurrence, Judge Lynne stayed discovery [2] and ordered the parties to stipulate to the relevant facts and to submit cross-motions for summary judgment on the constitutionality of the Florida IOTA program. While these motions were pending, Petitioner again attempted to enjoin the Foundation from disbursing IOTA funds. After a hearing, Judge Lynne granted Respondents' motion for summary judgment on the constitutional claims and denied Petitioner's motion for partial summary judgment, thereby mooting Petitioner's motion for an injunction. The District Court declined to exercise pendent jurisdiction over Petitioner's state-law claims. *Cone v. The Florida Bar*, 626 F. Supp. 132 (M.D. Fla. 1985). The United States Court of Appeals for the Eleventh Circuit affirmed, *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987), and this proceeding followed.

SUMMARY OF THE ARGUMENT

None of the considerations set forth in Supreme Court Rule 17 justifies the grant of a writ of certiorari in this case. In affirming the District Court's decision, the Court of Appeals merely agreed with the explicit holdings of seven state supreme courts and one state intermediate appellate court, and the implicit decisions of some 20 other state supreme courts, *see Cone v. State Bar of Florida*, 819 F.2d at 1006 n.5, that IOTA programs do not work an unconstitutional taking of private property without compensation.

But for the IOTA program, Petitioner's nominal deposit would not have generated net interest because of

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[2] Contrary to Petitioner's suggestion in footnote 3 of the Petition, she had an opportunity to obtain discovery of the administrative costs of subaccounting an IOTA account, she did not object to the stay of discovery in the District Court and she did not raise the "discovery" issue in the Eleventh Circuit. She should not be heard to complain in this Court.

the practical and economic constraints of banking laws and trust account practices. No "property" existed to be taken. As the District Court perceptively noted:

> When Justice Johnson observed in *Himely v. Rose*, 9 U.S. (5 Cranch) 313, 319 (1809), that "interest goes with principal, as the fruit with the tree," his illustration necessarily assumed the existence of a fruit-bearing tree. Mrs. Glaeser had no legitimate expectancy that she would receive income from her $13.75. She may not use the fifth amendment to create a pecuniary windfall where none previously existed.

Cone v. The Florida Bar, 626 F. Supp. 132, 136 (M.D. Fla. 1985) (citation omitted).

The decision of the Court of Appeals is not in conflict with the decision of any other federal appellate court, or with the decision of any state court of last resort, and its resolution of the federal question presented here does not conflict with applicable decisions of this Court. Therefore, Respondents respectfully submit that the Court should decline to grant certiorari.

ARGUMENT

Petitioner would have this Court believe that the grant of a writ of certiorari is necessary to remove the "uncertainty" surrounding the constitutionality of IOTA programs and "resolve the question" once and for all. Petition at 5. However, Florida's IOTA program is certainly and without question constitutional, and the Court of Appeals followed established constitutional precedent in reaching that conclusion.

I. The Decision Of The Court Of Appeals Is In Accord With The Decisions Of All The State Courts That Have Passed On The Constitutionality Of IOTA Programs

At last count, 44 states and the District of Columbia had adopted some version of the IOTA program, whereby

client funds held in trust by lawyers which are either nominal in amount or to be held for a short period of time are pooled and placed in interest-bearing bank accounts, with the interest being used to fund legal aid organizations, law school scholarships and other public-interest measures. ABA IOLTA Clearinghouse, 4 IOLTA Update (Summer, 1987).[3] The startling popularity of these programs is directly attributable to one fact: because of a combination of ethical principles, federal banking regulations and practical economics, funds which are now being put to useful work in support of the public good would otherwise be lent interest-free to financial institutions. A brief description of the background of the IOTA program is necessary for a proper understanding of that fact.

Attorneys frequently have the need to hold the funds of their clients, including cost advances such as Mrs. Glaeser's. When doing so, lawyers are ethically bound to keep such funds in an account separate from the lawyer's own money and available on demand, so that they can be delivered promptly to the client if he or she so requests. *See* Model Code of Professional Responsibility DR 9-102. Historically, this meant that attorneys had to deposit client trust funds into non-interest-bearing checking accounts because federal law until recently prohibited the payment of interest on demand bank accounts. *See* Banking Act of 1933, ch. 89, § 11(b), Pub. L. No. 66, 48 Stat. 181 (1933). In 1980, federal banking laws were changed to allow the payment of interest on certain types of demand accounts, known as negotiable order of withdrawal (NOW) accounts, but the funds in such ac-

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[3] At the time this Update was published, only Alabama, Indiana, New Jersey, Pennsylvania, West Virginia and Wyoming had not adopted an IOTA program. However, Respondents have been informed by members of the ABA IOLTA Clearinghouse that Alabama has since joined the majority camp, bringing the number of participating states to 45.

counts may only be owned by individuals, certain charitable organizations and public entities. *See* 12 U.S.C. § 1832(a) (1982). Thus, a law firm organized as a partnership or corporation cannot maintain a NOW account in its own name, and cannot maintain a NOW account as trustee for its clients if any of those clients is a partnership or corporation. Finally, although there is no legal impediment to placing funds belonging to an individual such as Mrs. Glaeser in a separate NOW account or a pooled NOW account containing only funds belonging to individuals, non-legal obstacles preclude these alternatives. Banks offering NOW accounts customarily impose relatively high minimum balance requirements; Holland & Knight's bank, for example, has always required at least a $100.00 minimum balance, well above Petitioner's $13.75 deposit. Joint Factual Stipulation 28. A pooled account would meet the minimum balance requirement, but Respondents presented uncontradicted affidavit proof that the administrative costs of subaccounting a pooled account would exceed the interest generated by nominal or short-term funds. Affidavit of John F. Dwiggins; Affidavit of Herbert C.M. Hoover. Thus, in the absence of IOTA, law firms such as Holland & Knight would have no choice but to leave their trust funds in non-interest-bearing checking accounts.

The IOTA programs represent a simple means of surmounting these obstacles and eliminating the interest-free use of large quantities of money by financial institutions. Because a non-profit organization such as the Foundation is the sole income beneficiary of the accounts, the programs are in compliance with federal banking laws. Because the income is paid to a single beneficiary, no subaccounting expenses are incurred. In brief, IOTA programs accomplish a useful and lawful transfer of income from financial institutions to worthy public causes. As the Supreme Court of Florida observed when it adopted the program at issue here:

> The foremost objective of our . . . program was to enhance the capability of the legal profession to deliver legal services to the poor. The broad delivery of legal services has long been a cherished commitment of this Court. At a time in this nation when existing governmental resources for this purpose are drastically threatened, our revisitation to this program provides a propitious occasion to reemphasize our commitment and to revalidate our methodology.

In re Interest on Trust Accounts, 402 So. 2d 389, 396 (Fla. 1981) (footnotes omitted). Because the interest income used to accomplish these objectives "would never benefit the client under any set of circumstances," 402 So. 2d at 395, the economic interests of the client are not affected by the program.[4]

The constitutionality of IOTA programs has been tested in one adversarial state court proceeding, *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (1984), *cert. denied sub. nom. Chapman v. State Bar of California*, 106 S. Ct. 142 (1985), and eight other state judicial proceedings.[5] All the state

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[4] The District Court specifically found that, absent the IOTA program, nominal or short-term trust funds such as Mrs. Glaeser's are "unproductive and inappropriate for investment." *Cone v. The Florida Bar*, 626 F. Supp. at 133. Petitioner has not challenged this finding.

[5] *In re Interest on Trust Accounts*, 402 So. 2d 389, 395 (Fla. 1981); *In re Petition of Iowa State Bar Ass'n*, No. 84-1641 (Iowa 1984), *cert. denied sub nom. Rowin v. Supreme Court of Iowa*, 105 S. Ct. 2325 (1985); *Petition of Mass. Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985); *Petition of Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); *In re Adoption of Amendments to CPR DR 9-102*, 102 Wash. 2d 1101 (1984).

In adopting the IOTA program in its state, the Arkansas Supreme Court did not explicitly address the constitutional issue, but implicitly found that clients have no cognizable property right to the interest generated by IOTA deposits: "At present, the earnings of

courts that have passed on the question have agreed with the Court of Appeals that IOTA programs do not effect an unconstitutional taking because they create income that could not, under any circumstances, accrue to the benefit of the client. Of the remaining 36 jurisdictions that have adopted IOTA programs, at least 20 have done so through judicial promulgation rather than legislation, and these courts must be considered to have implicitly determined that the program being adopted did not violate the constitution. *See Cone v. State Bar of Florida*, 819 F.2d at 1006 n.5. Not a single court has concluded that IOTA programs are unconstitutional. There is no conflict for this Court to resolve.

II. The Decision Of The Court Of Appeals Is Not In Conflict With Precedents Of This Court

Petitioner argues that the holding of the United States Court of Appeals for the Eleventh Circuit is in conflict with this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In *Webb's*, this Court held unconstitutional a Florida statute which awarded to the clerk of a county court any interest earned on interpleader funds deposited with the registry of the court, where another statute already imposed a fee for the services of the clerk. The principal amount involved in the case was roughly $1,800,000 and the amount of interest approximately $90,000. This Court held that under the peculiar circumstances presented by the case, the statute was unconstitutional:

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funds held in trust accounts can benefit neither the attorney nor the client, but simply redound to the benefit of the depository institution." *In re Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W.2d 355 (1984).

Respondents are advised by members of the ABA IOLTA Clearinghouse that the supreme courts of Indiana and West Virginia rejected IOTA programs in their respective states on non-constitutional grounds immaterial to the issue on this appeal.

> We hold *under the narrow circumstances of this case*—where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute . . . —Seminole County's taking unto itself . . . the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for the services it renders.

449 U.S. at 165 (emphasis added).

The factual distinctions between this case and *Webb's* are obvious. First and most importantly, the $1.8 million fund deposited with the court in *Webb's* was entirely capable of earning interest for its owner outside the interpleader procedure established by Florida law. Mrs. Glaeser's $13.75, in contrast to the $1.8 million in *Webb's*, could not independently earn interest net of administrative costs. In a very real sense, Mrs. Glaeser's $13.75 could not have borne any "fruit" for herself or others but for the IOTA program. *See Cone v. State Bar of Florida*, 819 F.2d 1002, 1004 (11th Cir. 1987); *Cone v. The Florida Bar*, 626 F. Supp. 132, 136 (M.D. Fla. 1985). In *Webb's* there was "property" to be taken; here there is not.

Webb's also is readily distinguishable from this case because the statutory regime found wanting in *Webb's required* interpleading complainants to deposit the sum at issue with the registry of the court. Mrs. Glaeser, however, was not required to deposit her $13.75 with Holland & Knight.

A final distinguishing feature of *Webb's* is that the decision was specifically based on the fact that the Flor-

ida statutes allowed the state to "exact two tolls" by obtaining both a service fee and accrued interest; again, there is no parallel provision here. 449 U.S. at 159. For all of these reasons, every reported IOTA decision considering the fifth amendment "taking" question has found *Webb's* to be distinguishable and therefore not controlling. *See In re Interest on Trust Accounts*, 402 So. 2d 389, 395-96 (Fla. 1981); *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305, 312 (1984); *Petition of Mass. Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715, 718 (1985); *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258, 1261 (1982); *In re Adoption of Amendments to CPR DR 9-102*, 102 Wash. 2d 1101 (1984).

Petitioner also argues that the decision of the Court of Appeals is in conflict with this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), apparently because the appellate court asked whether Petitioner had a "claim of entitlement" to the interest generated by her deposit in determining whether it was her "property" for purposes of the just compensation clause of the fifth amendment. *See Cone v. State Bar of Florida*, 819 F.2d at 1004. *Roth* was a procedural due process case, and the relevant language from it is as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

408 U.S. at 577. Petitioner contends that the *Roth* "legitimate claim of entitlement" language is inapposite in a taking case, and particularly so when "the State permits private property to generate a benefit of which it then claims ownership." Petition at 8. This Court, however, has treated the discussion in *Roth* as a general analysis of the concept of "property" for federal constitutional purposes, and has repeatedly cited it in taking

cases as well as due process cases. *See Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1260 (1987) (dissenting opinion).[6] Indeed, the *Roth* test is used in the very case on which Petitioner so heavily relies, *Webb's Fabulous Pharmacies*:

> We, of course, also accept the further proposition, pressed upon us by the appellees, that "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection.

449 U.S. at 161. In any case, it is quite clear that the decision of the Court of Appeals rested on the commonsense recognition that no property was taken from Petitioner because "[s]tanding alone, her deposit in the IOTA account could not earn anything." *Cone v. State Bar of Florida*, 819 F.2d at 1007. There is no conceivable conflict[7] between that conclusion and *Roth*.[8]

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[6] *Webb's* has also been cited in at least one due process case. *See Hudson v. Palmer*, 468 U.S. 517, 545 n.11 (1984) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

[7] Two opinions cited without explanation by Petitioner, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 55 U.S.L.W. 4781 (U.S. June 9, 1987) (No. 85-1199), and *Nollan v. California Coastal Comm'n*, 55 U.S.L.W. 5145 (U.S. June 26, 1987) (No. 86-133), have no bearing whatever on the issues in this case. Both cases assumed the existence of a valid property right and went on to address the question of whether that property right had been taken by state land-use regulation.

[8] Even assuming *arguendo* that Petitioner did have a property right which is protected by the fifth amendment, the IOTA program at most amounts to a constitutionally permissible restriction on the use of that property, not an impermissible taking. The trial court,

CONCLUSION

Because none of the considerations governing the grant of a writ of certiorari justifies such a grant in this case, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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applying the "bundle" and "strand" analysis of *Andrus v. Allard*, 444 U.S. 51 (1979), astutely observed that "the bundle of property rights of clients with nominal or short-term trust deposits is substantially intact: the IOTA program does not interfere with the client's ability to withdraw the . . . deposit and do with it as he wishes. At most, IOTA affects merely one strand of property rights by putting otherwise dormant . . . deposits to work to improve the legal system." *Cone v. The Florida Bar*, 626 F. Supp. 132, 137 (M.D. Fla. 1985). The Court of Appeals did not reach this issue.

APPENDIX

FLORIDA BAR INTEGRATION RULE 11.02(4)(d) (RELEVANT EXCERPTS)

(4) *Trust funds and fees.* Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. . . .

(d) *Interest-bearing Trust Accounts.* A member of The Florida Bar who elects to create or maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time shall comply with the following provisions:

. . .

(iii) Lawyers or law firms electing to deposit client funds in a trust savings account shall direct the depository institution:

(A) to remit interest or dividends, as the case may be, on the average monthly balance in the account or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the Florida Bar Foundation, Inc.;

(B) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

(C) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.